No. 00-1743

IN THE

Supreme Court of the United States

JAMES YORK BROWN,

Petitioner,

v.

ROLAND SCOTT LYFORD, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT UPSHUR COUNTY

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LIST OF PARTIES

The only other Respondent not listed in the caption with an interest in this petition is Upshur County, Texas.

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STATEMENT OF THE CASE

Respondent Upshur County is dissatisfied with the statement of the case presented by Petitioner and submits the following summary of facts relevant to this Court's decision:

A. Statement of Facts[1]

In 1990, Ann Goar ("Goar") and Debbie Minshew ("Minshew") as employees of the Texas Department of Protective and Regulatory Services were assigned to counsel the children of Loretta and Wendell Kerr. The Kerr children came into foster care upon allegations of sexual abuse leveled against Wendell Kerr. The counseling later expanded to include the children of Wanda Geer Hicks, whom Wendell Kerr had started dating. The Kerr and Hicks children began to tell of being tortured, molested, and sodomized by various individuals, including Wanda Geer, Lucas Geer, Wendell Kerr, Eugene Kerr, and Geneva Kerr. The alleged abuse included satanic rituals involving masks and knives. The children's stories related the murder, dismemberment, post-mortem rape, and cannibalism of babies and children by the abusing adults. Goar and Minshew recruited two private occult investigators, Brooks Fleig ("Fleig") and Steve Baggs ("Baggs") to assist in an investigation of these accounts by the children. Upshur County's elected district attorney, Tim Cone, moved the state district court in Upshur County to appoint a special prosecutor in the Kerr and Hicks

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1. Upshur County's statement of facts is taken, in large part, from the factual summaries contained in the Fifth Circuit's opinion and the magistrate judge's order. *See* Brown's Petition for a Writ of Certiorari, Appendices A and B, respectively.

prosecutions on the ground that he was disqualified due to a conflict of interest. The state district court appointed Roland Scott Lyford ("Lyford") "as special prosecutor to handle the above matters [six referenced cause numbers] to conclusion." The order of appointment did not confer upon Lyford any general powers relating to the district attorney's office. Lyford participated closely in the investigation, and in 1993, at Lyford's recommendation, the county hired Fleig and Baggs as criminal investigators.

There was extensive evidence of criminal activity by the Geer, Kerr, and Hicks adults. Medical examination of the children found genital and anal scarring consistent with sexual molestation. An adult, Lucas Geer, confessed to police that he participated in ritualistic child abuse and child murder, a confession corroborating the stories told by the Kerr and Hicks children. A search of the Kerr property found three shallow grave-like depressions in the soil, a shovel with blood residue on it, an area matching the children's description of where the abuses occurred, two devil masks, a blood-stained mattress cover, and four knives said by the children to have been used to murder and dismember children. Pursuant to a plea agreement, two of the charged adults identified items retrieved from the Kerr household as devices used to restrain and torture children. Finally, plastic bags were found buried on the Kerr property, containing bone fragments. Before Lyford took his evidence to the grand jury, the Texas Human Skeletal Identification Laboratory issued a report stating the remains were most probably human. Another report from a different laboratory, filed months after the indictment was issued, concluded that the remains were not human.

Despite a grand jury indictment, all charges were ultimately dropped. Child Protective Services criticized the methods of the investigators in interviewing the Kerr and Hicks children. CPS also objected to the suggestive nature of the questions asked by the investigators. An adult, Wanda Hicks, also known as Wanda Geer due to her marriage, later recanted, explaining that she developed her story out of the questions investigators put to her. Wendell Kerr had a corroborated alibi for the times of the alleged crimes, and the testimony of the child witnesses was suspect.

While the individual defendants were investigating the Kerr case, Sergeant James Brown ("Brown") was investigating the disappearance of Kelly Wilson. Wilson was 17 when she was reported missing in Gilmer, Texas. In 1993, one of the Kerr children, identified as "R.S.," claimed that Kelly Wilson had been abducted, raped, and murdered by the Kerrs. As a result, Brown's investigation began to overlap with the investigation being conducted by defendants.

R.S. implicated Brown in the charges of child abuse and the disappearance of Kelly Wilson. He stated that the police would not help, that they were also "bad," and described in general terms a person resembling Brown as having participated in the abuse. Later, Connie Martin — one of the adults involved — also implicated Brown by name. At the same time, the case against Brown had problems. Wanda Kerr was unable to identify Brown in a photo lineup. The narratives told by witnesses other than R.S. never mentioned Brown.

Lyford took this evidence to the Upshur County Grand Jury, which indicted the alleged abusers, including Brown. Brown was arrested and spent six days in jail. The charges were later dropped.

B. Course of Proceedings and Dispositions Below

On July 5, 1994, Petitioner Brown brought suit against Lyford and other individual defendants, Goar, Minshew, Fleig, and Brooks, alleging the violation of his right to be free from unreasonable seizure, malicious prosecution, false arrest, and false imprisonment. Brown also alleged that various defendants had conspired to deprive him of his constitutional rights and had committed various state law torts. On June 27, 1996, Brown amended his complaint to add Upshur County, Texas as a defendant. Lyford moved for summary judgment on the ground that he enjoyed absolute prosecutorial immunity. Upshur County moved for summary judgment on the following grounds:

1. Lyford was a state actor and not a policymaking official for Upshur County; and

2. Upshur County could not be liable for the acts of government officials who were shielded from liability by qualified immunity.

Goar, Minshew, Baggs, and Fleig also moved for summary judgment on the ground that they were immune from suit on the basis of qualified immunity.

United States Magistrate Judge Judith K. Guthrie granted Lyford summary judgment on the ground that he had absolute immunity for actions taken in prosecuting Brown and that Brown had failed to state a constitutional violation with respect to Lyford's investigative actions. Magistrate Judge Guthrie also granted summary judgment in favor of Upshur County on the ground that no county liability existed because Lyford was not liable. The court also granted summary

judgment to Goar, Minshew, Fleig, and Baggs on the ground of qualified immunity. The District Court entered judgment on September 29, 1999. Brown filed a Notice of Appeal seeking review of the District Court judgment.

The Fifth Circuit affirmed the judgment of the District Court. Regarding Brown's claims against Lyford, the Fifth Circuit held that Lyford enjoyed absolute prosecutorial immunity for his conduct before the grand jury, and like the other individual defendants, had qualified immunity for his investigatory conduct leading to the grand jury proceeding. *Brown v. Lyford*, 243 F.3d 185, 191 (5th Cir. 2001). As to Brown's claims against Upshur County, the Fifth Circuit held that Brown was not a policymaker for the county and that his actions did not impose liability on the county.

REASONS FOR DENYING THE WRIT

The summary judgment evidence proved that Lyford was not a final policymaker for Upshur County, and the County cannot be held liable for his acts. Brown presented no contrary evidence. Therefore, the Fifth Circuit correctly affirmed the trial court's judgment in favor of Upshur County.

Petitioner describes the issue as whether a district attorney pro tem can be a final policymaker for a Texas county, and states that the Fifth Circuit's answer in the negative is in conflict with other relevant decisions of this Court. This is not however, the issue that was before the Fifth Circuit, or indeed, is before this Court. The relevant inquiry is, "Did Upshur County delegate final policymaking authority to Scott Lyford, a district attorney pro tem?"

This issue has not been previously considered or decided by this Court as it is wholly dependent upon the summary judgment evidence presented to the trial court.

Brown's sole reason that this Court should grant a writ of certiorari demonstrates his misunderstanding of the Fifth Circuit's holding. He states:

> The Fifth Circuit's decision that a District Attorney Pro Tem cannot be a final policymaker for purposes of establishing *Monell* liability against a Texas County under 42 U.S.C. § 1983 is in conflict with relevant decisions of the Court.

However, a careful reading of the Fifth Circuit opinion reveals that the intermediate court did not hold that a district attorney pro tem cannot be a final policymaker for a Texas county, but rather that Petitioner presented no evidence that Lyford acted as a policymaker for Upshur County.

I. Summary Judgment Standard

Summary judgment is authorized if the movant establishes that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(c). Facts are considered "material" if they "might affect the outcome of the suit under the governing law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 2510, 91 L. Ed. 2d 202 (1986). A material fact creates a "genuine issue" if the evidence is such that the trier of fact reasonably could resolve the factual dispute in favor of either party. *Anderson*, 477 U.S. at 249, 106 S. Ct. at 2511. This Court has interpreted the plain language of Rule 56(c) to mandate "the entry of summary

judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, 106 S. Ct. 2548, 2552, 91 L. Ed. 2d 265 (1986).

If the party moving for summary judgment demonstrates the absence of a genuine issue of material fact, Rule 56(c) requires the nonmovant to go beyond the pleadings and show by affidavits, depositions, answers to interrogatories, admissions on file, or other admissible evidence that specific facts exist over which there is a genuine issue for trial. *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994). The party opposing summary judgment is required to identify specific evidence in the record and to articulate the precise manner in which that evidence supports that party's claim. *See Forsyth v. Barr*, 19 F.3d 1527, 1537 (5th Cir. 1994).

Unsupported allegations or affidavit or deposition testimony asserting ultimate or conclusory facts and conclusions of law are not sufficient to defeat a motion for summary judgment. *Duffy v. Leading Edge Products, Inc.*, 44 F.3d 308, 312 (5th Cir. 1995) (citing *Anderson*, 477 U.S. at 247, 106 S. Ct. at 2509-10). Factual controversies are to be resolved in favor of the nonmovant, "but only when there is an actual controversy, that is, when both parties have submitted evidence of contradictory facts." *Little*, 37 F.3d at 1075. Unless there is sufficient evidence for a jury to return a verdict in the nonmovant's favor, there is no genuine issue for trial. *Anderson*, 477 U.S. at 249, 106 S. Ct. at 2511.

In the summary judgment context, a trial court will only consider evidence that would be admissible at trial. *See Lavespere v. Niagia*, 910 F.2d 167, 176 (5th Cir. 1990). Inadmissible material may not be considered because it could not be used to establish a genuine issue of fact at trial. *Duplantis v. Shell Offshore, Inc.*, 948 F.2d 187, 191 (5th Cir. 1991). A court may not consider hearsay or unsworn documents as summary judgment evidence. *Martin v. John W. Stone Oil Distrib., Inc.*, 819 F.2d 547, 549 (5th Cir. 1987). Likewise, unauthenticated documents are not proper summary judgment evidence. *King v. Dogan*, 31 F.3d 344, 346 (5th Cir. 1994).

Many of the "facts" relied upon by Brown were not properly before the trial court. A trial court may only consider evidence that would be admissible at trial. Petitioner's statement of facts frequently refers to unsworn, unauthenticated interview transcripts, unauthenticated grand jury testimony, the unsworn, unauthenticated testimony of Dr. Richard Ault, and the unauthenticated hearsay testimony of Bruce Perry. Respondent objected to all of this material in the trial court. Although Petitioner includes this material in his statement of facts, it could not have been considered by the trial court because it was not proper summary judgment evidence.

II. County Liability

Under 42 U.S.C. § 1983, a county is not vicariously liable for the acts of its employees. *Monell v. Dep't of Social Services*, 436 U.S. 658, 694, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978). A person seeking to impose such liability on a county must do more than simply prove that the county employed a tortfeasor. *Monell*, 436 U.S. at 692. A county is

only liable under section 1983 for acts for which the entity itself is responsible. *St. Louis v. Praprotnik*, 485 U.S. 112, 123, 108 S. Ct. 915, 924, 99 L. Ed. 2d 107 (1988). Under section 1983, a municipality may be liable for constitutional violations caused by any of the following:

1. An officially promulgated policy of the municipality, *Monell*, 436 U.S. at 690, 694;

2. A custom or persistent practice of the municipality, *Monell*, 436 U.S. at 690-91;

3. A single decision by a municipal official with final policymaking authority, *Praprotnik*, 485 U.S. at 143 (Brennan, J., concurring); *Pembaur v. Cincinnati*, 475 U.S. 469, 480-81, 106 S. Ct. 1292, 89 L. Ed. 2d 452 (1986).

In order to determine whether a county employee is a final policymaker, courts must rely on state law. *Praprotnik*, 485 U.S. at 123. As the Fifth Circuit includes Texas, that circuit's expertise is instructive in determining Texas state law. *McMillian v. Monroe County*, 520 U.S. 781, 786-87, 117 S. Ct. 1734, 1737, 138 L. Ed. 2d 1 (1997).

III. An Elected District Attorney as Final Policymaker for the County He Serves

A county may only be held liable for acts of a district attorney when he functions as a final policymaker for that county. *Esteves v. Brock*, 106 F.3d 674, 678 (5th Cir. 1997). It is the duty of a court to identify officials who speak with final policymaking authority for a county concerning the action alleged to have caused the constitutional violation.

Jett v. Dallas Indep. Sch. Dist., 491 U.S. 701, 737, 109 S. Ct. 2702, 105 L. Ed. 2d 598 (1989). In order to impose liability on a county, the challenged action must have been taken pursuant to a policy adopted by the official responsible under state law for making policy in that area of the county's business. *Praprotnik*, 485 U.S. at 123.

Texas law provides that a county is not liable for a district attorney's prosecutorial actions taken in the course of judicial proceedings. In *Esteves*, Victor Esteves, an African-American, filed a pro se complaint and alleged that Leslie Brock, while acting as Assistant District Attorney for Harris County, Texas, violated Esteves' right to equal protection of the laws by excluding blacks from the jury that convicted him of aggravated robbery. *Esteves v. Brock*, 106 F.3d 674, 676 (5th Cir. 1997). Esteves alleged that Harris County was liable for Brock's actions.[2] Harris County filed a motion for summary judgment contending that Brock was not a final policy maker for the county, and the county could not be sued for her actions either directly or on the basis of *respondeat superior*. *Id.* at 676. The Fifth Circuit held that neither an Assistant District Attorney nor a County can be held liable for prosecutorial actions taken on behalf of the State in the course of judicial proceedings. Applying Texas law, the court held that when acting in the prosecutorial capacity to enforce state penal law, a district attorney is an agent of the State, not of the county in which the criminal case happens to be prosecuted. Counties may, however, be liable for the actions of a district attorney who functions as a final policy maker for the county. *Id.* at 768 (citing *Familias*

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2. In *Esteves v. Texas*, 859 S.W.2d 613 (Tex. App. – Houston [1st Dist.] 1993, pet. ref'd), Esteves' conviction was reversed on a finding that Brock had used peremptory challenges to strike three black jurors from the jury panel in violation of *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986). *Esteves*, 106 F.3d at 676.

Unidas v. Briscoe, 619 F.2d 391, 404 (5th Cir. 1980) (court determined that a county can be liable for non-judicial actions taken by a county judge in his role as final policy maker for the county)).

While not liable for prosecutorial acts, a county may be liable for the acts of its elected district attorney when he acts in an administrative or managerial capacity. An elected county official "holds virtually absolute sway over the particular tasks or areas of responsibility entrusted to him by state statute and is accountable to no one other than the voters for his conduct therein." *Familias Unitas*, 619 F.2d at 404 (discussing county liability for actions of county judge).

Two Fifth Circuit cases have found county liability for the managerial acts of elected district attorneys. In *Davis v. Ector County*, Davis was an investigator assigned to the Permian Basin Drug Task Force, supervised by Garrison, the elected district attorney. 40 F.3d 777, 780 (5th Cir. 1994). Davis ignored a warning from Garrison and involved himself in his wife's sexual harassment suit against Ector County Sheriff's Department. Garrison ultimately terminated Davis for defying him. The Fifth Circuit held that Garrison was a policymaker for the county because he enjoyed free reign over the district attorney's office and set departmental policy without oversight. In *Crane v. Texas*, Crane alleged that he suffered constitutional injury due to Dallas County's unconstitutional policy of issuing misdemeanor capias without a finding of probable cause by a neutral and detached magistrate in violation of federal constitutional guarantees and state statute. 759 F.2d 412, 414 (5th Cir. 1985). The county's elected district attorney, Henry Wade, formulated and implemented the procedure for issuing misdemeanor

capias. Among the issues in the case was whether Wade was a final policymaker for Dallas County. After Crane challenged the procedure on constitutional grounds, Wade altered the policy to conform to constitutional and statutory requirements. The Fifth Circuit held Wade was a final policymaker for Dallas County, stating,

> The county in this case acted through the District Attorney; he selected the means by which the county would achieve a sound and legally sufficient capias system. His choice of an unsound and legally insufficient system represents county policy for which the county is liable.

Crane, 759 F.2d at 430.

IV. A District Attorney Pro Tem as a Final Policymaker

Texas law provides for the appointment of an attorney pro tem when the elected district attorney is absent or disqualified. "Whenever an attorney for the state is disqualified to act in any case . . . , the judge of the court in which he represents the state may appoint any competent attorney to perform the duties of the office during the absence or disqualification of the attorney for the state." TEX. CRIM. PROC. CODE ANN. art. 2.07(a) (Vernon 1977). An attorney pro tem takes the place of the disqualified district attorney and assumes all the district attorney's powers and duties in the case. *State v. Rosenbaum*, 852 S.W.2d 525, 528 (Tex. Crim. App. 1993) (order appointed district attorney pro tem to "investigate" and "prosecute" a case). An attorney pro tem assumes the duties of the elected district attorney and replaces the district attorney in performing germane functions of the office related to the purposes contemplated

by the appointment. *Stephens v. State*, 978 S.W.2d 728, 731 (Tex. App. – Austin 1998, pet. ref'd).

V. Upshur County Is Not Liable for Lyford's Actions

Upshur County is not liable for Lyford's prosecutorial acts. When Lyford acted in a prosecutorial capacity, he was enforcing Texas penal law, and was an agent of the State of Texas, not Upshur County. Therefore, when Lyford initiated criminal proceedings against Brown to enforce state law, Upshur County was not liable for his actions.

Neither is Upshur County liable for any non-prosecutorial act of Lyford because Lyford was not a final policymaker for Upshur County. Tim Cone, not Lyford, was the elected district attorney of Upshur County. As such, Cone was responsible for the general management and administration of his office. A state district judge appointed Lyford to handle six cases. The uncontroverted summary judgment evidence established that Lyford was not a final policymaker for Upshur County. Upshur County authority rested in her elected officials, the commissioners, County Judge Charles L. Still, Sheriff R.D. Cross, and Criminal District Attorney Tim Cone. None of these officials delegated final policymaking authority to Lyford, and Brown presents no evidence to the contrary. Further, Brown presented no evidence that Lyford exceeded his role as prosecutor pro tem so as to function as the final policymaking authority for Upshur County in the investigation of the cases assigned to him. Instead, the summary judgment evidence established that Lyford acted for the district attorney only in regard to a few cases. He did not assume administration or management of the district attorney's office, or indeed for the cases assigned to him. For example, Lyford wanted to hire investigators, but was not authorized to do so. He could only recommend that the county hire them.

CONCLUSION

This Court should deny Brown's petition for writ of certiorari. There was simply no evidence that Lyford acted as a final policymaker for Upshur County. Brown's efforts to disguise this case as one about the role of a district attorney pro tem are misleading. This case is about the evidence presented to the court, and the evidence conclusively established that Lyford was not vested with final policymaking authority for Upshur County. Brown presented no evidence to the contrary.

Wherefore, Upshur County respectfully requests that this Court deny Brown's petition.

Respectfully submitted,

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